

STATE OF MICHIGAN
IN THE SUPREME COURT

CAROL KRUSCHKE,

Supreme Court No: _____

Plaintiff/Appellant^{ce}

-vs-

Court of Appeals No: 259601
Marquette County Circuit Court
LC No. 03-40879-NH

of 11/3/05

T. Solka

JAMES R. LOVELL, M.D.
and JAMES R. LOVELL, M.D., P.C.,

Defendants/Appellees^{ants}

and Marquette General Hospital, Defendant. OK

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NOTICE OF HEARING
APPELLEES' APPLICATION FOR LEAVE TO APPEAL
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MICHIGAN SUPREME COURT

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ORDER APPEALED FROM AND RELIEF SOUGHT
APPEAL OF ORDER OF REMAND

Defendants appeal from the unpublished opinion of the Court of Appeals, released November 3, 2005, reversing the order of the Marquette County Circuit Court entered November 29, 2004, which granted Defendants' Motion For Summary Judgment under MCR 2.116(C)(7).

Defendants ask that this Court reverse the decision of the Court of Appeals and reinstate the judgment of the Marquette County Circuit Court granting summary disposition in favor of Defendants under MCR 2.116(C)(7).

BASIS OF JURISDICTION

The Supreme Court has jurisdiction under MCR 7.301(A)(2) and MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED

1. Was the Plaintiff-Appellant aware of the nature of her injury and its relationship to Defendant's surgery in 1998?

The trial court answered: "Yes."

The Court of Appeals answered: "No."

Plaintiff-Appellant answers "No."

Defendants/Appellees answer "Yes."

2. Did the Circuit Court properly determine the Plaintiff-Appellant was aware of a possible cause of action in 1998?

The trial court answered: "Yes."

The Court of Appeals answered: "No."

Plaintiff-Appellant answers "No."

Defendants/Appellees answer "Yes."

3. Did the Circuit Court properly determine that Plaintiff's-Appellant's claim was barred by the statute of limitations under MCR 2.116(C)(7)?

The trial court answered: "Yes."

The Court of Appeals answered: "No."

Plaintiff-Appellant answers "No."

Defendants/Appellees answer "Yes."

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INTRODUCTION

This is a medical malpractice case. Plaintiff claims medical negligence and damages resulting from a surgical procedure performed in April, 1998. Plaintiff filed her Complaint against Defendants on September 8, 2003.

Defendants moved for summary disposition under MCR 2.116(C)(7) on the grounds that Plaintiff's claim was not filed within the applicable statute of limitations. The Marquette County Circuit Court granted Defendants' Motion on November 29, 2004. Plaintiff appealed to the Michigan Court of Appeals, which reversed the trial court and remanded the case for further proceedings in a 2-1 opinion issued November 3, 2005.

Defendants contend the Court of Appeals erred legally and factually in their analysis of this case. Subsequent to the surgery, Plaintiff complained of left lower quadrant and left-sided abdominal pain throughout 1998 and until September, 1999 when she obtained a copy of her records and transferred her medical care to another obstetrician/gynecologist. In its opinion, the Court of Appeals focused only upon the performance of the hysterectomy procedure, which Plaintiff claims was "unnecessary," and ignored the persistent left lower quadrant pain that was the initiating cause of the surgery. Plaintiff knew in 1998 and 1999 that the surgery was ineffectual in removing her pain, which was at least as persistent and severe as it was prior to the surgical procedure. It was as a result of this that Plaintiff left Defendants' medical practice in September, 1999. Defendants contend Plaintiff knew or should have known of an injury and its possible cause, making her aware of a possible cause of action sufficient to initiate the running of the statute of limitations.

Defendants contend the Court of Appeals improperly interpreted and applied the decision of this Court in *Solowy v Oakwood Hospital Corporation*, 454 Mich 214; 561 NW2d 843 (1997). In doing so, the Court limited its focus on the “nature of the claimed injuries” to the hysterectomy, without properly applying or acknowledging the persistent lower quadrant pain complained of by the Plaintiff in her several post-surgical appointments with Dr. Lovell. The Court of Appeals also relied upon pre-*Solowy* cases described by dissenting Judge O’Connell as “outdated.” Defendants contend that the dissenting opinion in the Court of Appeals properly states and interprets the decision of this Court in *Solowy*, supra.

The majority opinion of the Court of Appeals improperly construes MCL §600.5838a(3) as it ignores that statute’s reference to “physical discomfort,” in omitting from its analysis Plaintiff’s continuing complaints of left-sided pain. The majority opinion of the Court of Appeals also conflicts with the language and intention of this Court’s opinion in *Solowy*, supra. The majority opinion of the Court of Appeals is in conflict with *Solowy*, supra, and limits that opinion so as to defeat the purpose intended by this Court. Statute of limitations issues are frequently raised in medical malpractice litigation, and this is an issue of importance to the jurisprudence of the State of Michigan. This case is an opportunity for the Michigan Supreme Court to clarify its holding and intentions in *Solowy*, supra and to provide additional direction and guidance to trial courts and the Court of Appeals.

Defendants seek leave to appeal to present this matter to the Michigan Supreme Court to urge that the decision of the Court of Appeals be reversed and the decision of

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the Marquette County Circuit Court be reinstated, which decision granted Defendants summary disposition under MCR 2.116(C)(7).

STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDINGS:

This is a medical malpractice case. Plaintiff claims Dr. James R. Lovell, M.D. breached the applicable standard of care in the performance of a surgical procedure at Marquette General Hospital on April 18, 1998. Plaintiff claims Dr. Lovell removed her uterus and ovaries without sufficient medical necessity, and that as a result she has sustained injuries consisting of left abdominal pain, the loss of her ability to conceive and bear children, and the loss of her body's ability to produce estrogen, requiring that the Plaintiff undergo hormone replacement therapy. The surgery was performed as a result of the Plaintiff's complaints of severe left-sided abdominal pain. Plaintiff complains that the surgery did not relieve or lessen her pain, and that the left-sided abdominal pain persisted subsequent to the surgery. Plaintiff complains that the surgery performed by Dr. Lovell was ineffectual and unnecessary.

The Plaintiff was admitted to Marquette General Hospital on April 17, 1998 complaining of severe left-sided pelvic pain. Laparoscopic surgery was performed on April 18, 1998 and during that procedure Dr. Lovell determined more extensive surgery was required. In the exercise of his medical judgment, and under the patient's consent, he excised a large left ovarian cyst, performed a right salpingo-oophorectomy and a total abdominal hysterectomy. Plaintiff was a patient at Marquette General Hospital until April 22, 1998. All of the events of which Plaintiff complains in her complaint occurred in April, 1998. Defendants state that Dr. Lovell made a determination that a laparotomy was the appropriate surgical procedure under the circumstances, in the exercise of his medical judgment, and that this matter had been discussed with the

Plaintiff prior to the surgical procedure and she had given her written consent.

Defendants allege Dr. Lovell had extended discussions with the patient regarding his preliminary diagnosis, possible outcomes of the surgical procedure, and the risks of the surgical procedure. (Answer ¶10) Defendants allege that the Plaintiff consented to the surgical procedure with knowledge of such risks. (Answer ¶10)

Following surgery the Plaintiff continued to complain of left lower quadrant pain, describing it as persistent and very severe. Plaintiff reported and complained to Dr. Lovell that the surgery was ineffectual in alleviating her pain, and in September, 1999, Plaintiff obtained her medical records from Dr. Lovell and sought medical evaluation and treatment from a different obstetrician/gynecologist, Dr. Licia Raymond of Marquette, Michigan.

As part of their Answer, Defendants included a motion for summary disposition under MCR 2.116(C)(7) on the grounds that Plaintiff's claim was not filed timely within the applicable statute of limitations. (Answer ¶38) Defendants-Appellees filed a motion with the Marquette County Circuit Court for summary disposition, and that motion was heard by Circuit Judge Thomas L. Solka on November 12, 2004. Judge Solka rendered his decision from the bench. An Order granting summary disposition and dismissal was entered by the Marquette County Circuit Court on November 29, 2004. (A copy of the Order Granting Summary Disposition and Dismissal dated November 24, 2004 and entered November 29, 2004 is attached as **Exhibit 1**. A copy of the transcript of the hearing held in the Marquette County Circuit Court on November 12, 2004 is attached as **Exhibit 2**.)

It is the position of Defendants that Plaintiff knew her ovaries and uterus had been removed by Dr. Lovell in the surgery performed on April 18, 1998; the Plaintiff knew as of the time of her discharge from Marquette General Hospital on April 22, 1998 that she would no longer be able to bear children and would be subject to hormone replacement therapy; that the Plaintiff continued to have left abdominal pain; and that the Plaintiff, on the basis of objective facts, was aware of a possible cause of action, as she was aware of the nature and extent of her injuries and the causal link between those injuries and the surgery performed by Dr. Lovell. Subsequent to the surgery, Plaintiff continued to complain of left lower quadrant pain which she stated existed at least to the same extent as it had prior to surgery. Plaintiff was aware of the effects of the hysterectomy. Plaintiff's deposition testimony establishes she was aware of all of the elements necessary for her cause of action in 1998 and that the Plaintiff, at that time, discovered or should have discovered the existence of her claim as required by MCL §600.5838a(3). It is the position of Defendants-Appellees that the Marquette County Circuit Court properly entered an Order granting Defendants' Motion for Summary Disposition under MCR 2.116(C)(7), and that the divided decision of the Michigan Court of Appeals should be reversed.

B. STATEMENT OF THE FACTS:

Plaintiff became a patient of Dr. Lovell's in October, 1993. She had a prior medical history of treatment for dysplasia of the cervix (1992) and removal of ovarian cysts (1985-1986). In November, 1994 she reported she was not on birth control medication and "she would like to have a tubal," referring to a tubal ligation procedure. Dr. Lovell's office record states: "She is 33 years old; she does not want any children even if she ever gets married, which she doubts." (Office record for November 4, 1994) This was not discussed further with Dr. Lovell and no procedure was performed. Plaintiff went on birth control medication but reported problems. On several occasions she reported pelvic pain and low back pain. On April 14, 1998 she again reported pelvic pain and discussed her earlier laparoscopic procedure which removed ovarian cysts. She was scheduled for a pelvic ultrasound.

On April 17, 1998 Plaintiff presented at the emergency department at Marquette General Hospital. Dr. Lovell was notified. Plaintiff complained of severe left-sided pelvic pain. She reported the pain as having been present for the past two weeks. Dr. Lovell noted that the ultrasound determined the presence of left adnexal mass. Dr. Lovell also noted that the reviewing radiologist raised a concern that a cyst adenocarcinoma could not be excluded.

Dr. Lovell's admitting diagnosis was left-sided pelvic pain with associated left adnexal mass, "etiology unclear." His plan was to perform a diagnostic laparoscopy "with possible laparotomy."

The following day, April 18, 1998 Dr. Lovell initiated the laparoscopic procedure. This was a diagnostic laparoscopy which led to a laparotomy based upon Dr. Lovell's diagnostic findings. His operative note states:

"I have discussed with her at length and in great detail the possible outcomes depending upon the findings at the time of the laparoscopy." (Operative report of April 18, 1998)

Dr. Lovell's operative note reports the finding of a "huge, but benign-appearing left ovarian cyst" which was adherent to the pelvic side wall. He found very extensive adhesion formation associated with endometriosis. The cyst measured 8-9 cm and he noted the capsule of the cyst "was very extensively involved with endometriosis" He also found the right ovary to be extensively involved with endometriosis, as was the entire cul-de-sac and posterior leaf of each broad ligament. In the exercise of medical judgment, Dr. Lovell proceeded to the laparotomy procedure "as definitive therapy." The surgery proceeded with removal of the uterus and both ovaries.

The patient remained at Marquette General Hospital until April 22, 1998. Upon her discharge, she was to follow up with Dr. Lovell in six weeks and to let him know if she had any problems. During her time in Marquette General, and prior to the surgical procedure, Plaintiff executed the usual consent forms. This included a consent for performance of a "diagnostic laparoscopy with possible laparotomy." Interestingly, and unknown to Dr. Lovell, the Plaintiff added a handwritten note to the reverse side of the consent stating:

"Dr. Lovell said he would only take what reproductive organs - uterus & ovaries that looked diseased. He would leave in what he could - I don't prefer a total hysterectomy at age 36." (Signed by the Plaintiff on April 18, 1998)

This statement is consistent with Dr. Lovell's operative note that he had thoroughly discussed the procedure concerning its potentials and risks with the Plaintiff.

Dr. Lovell evaluated the patient on June 3, 1998. His office note states: "She still has multiple questions about what actually happened at the time of the surgery." His note states that after a lengthy discussion as to the findings at the time of the surgery and the surgery itself, he discussed the pathology report "to the patient's satisfaction." She was placed on a hormone therapy medication and told to return in six weeks for a final assessment regarding the adequacy of the hormone replacement program.

On November 24, 1998, the patient reported persistent left-sided abdominal pain which she described as occasionally severe. On that occasion, Dr. Lovell discussed the possibility of a repeat laparoscopy to evaluate her continuing complaint of left lower quadrant pain. On December 18, 1998, the patient reported she felt no better than she did prior to the surgery, and she continued to complaint of severe left sided abdominal pain. On December 18, 1998, she noted that the pain was worse than it had been on her visit in November. She reported being very frustrated that the pain continued after surgery. She said that she thought she would be better and no longer have pain once the surgery had been completed. She voiced concern that she would always have that pain and she was reluctant to have additional surgery since the initial surgery had proved unsuccessful in relieving her discomfort. On January 5, 1999, Dr. Lovell's office note reports her as being "very frustrated and distraught."

On March 2, 1999, she called complaining of left side pain with increased activity and joint pain. That was the last time she was seen by Dr. Lovell. On September 16,

1999, the Plaintiff requested her medical records so that she could transfer her medical care from the Defendant to Dr. Licia Raymond, another obstetrician/gynecologist in Marquette, Michigan.

Plaintiff's complaints in this action are (a) loss of reproductive capacity, (b) the need for hormone replacement therapy, and (c) continuation of left side pelvic/abdominal/back pain. Plaintiff's statements and deposition testimony establish that she has had these conditions since the surgery, and that she has been aware of them since the surgery.

In her deposition, Plaintiff described the pain that brought her to the emergency department on April 17, 1998, as constant and very sharp. Plaintiff had no recollection of being with Dr. Lovell prior to surgery or being in the operating room, and she testified she did not remember anything from that morning or after her surgery. (Plaintiff's deposition, p. 20, 26-17) Plaintiff remembers waking up and seeing a "huge thing of bandages on my stomach." (Plaintiff's depo. p.27) She remembered Dr. Lovell coming in to talk to her but had no memory of the conversation.

When Plaintiff left the hospital she knew that her ovaries and uterus had been removed, and she had been prescribed estrogen therapy. She recalled seeing Dr. Lovell on June 3, 1998, for a follow-up examination, but did not recall any conversations. (Plaintiff's depo. p.31 and 34) She admitted in her deposition that she knew at the time of her six week check-up that her uterus had been removed, and that would preclude her from having children. She knew that her ovaries had been removed, and that would require that she take hormone therapy. She reported that she was "in shock and in anger," as she did not want that to be the outcome of the surgery.

(Plaintiff's depo. p.35) Plaintiff testified that she was sure she talked to Dr. Lovell after the surgery about why he removed her uterus and ovaries, but did not remember the specific conversation. She testified she was surprised at the outcome of the surgery. (Plaintiff's depo. p.37-38)

In her deposition testimony, Plaintiff indicated she continued to have lower left abdominal pain, which she described as severe. She testified this left abdominal pain did not exist prior to April, 1998 and the surgery. She testified that since April, 1998 she has been unable to sleep on either side and can only sleep on her back. (Plaintiff's depo. p.39 and 41) As a result, in September, 1999 Plaintiff transferred her medical care and evaluation to Dr. Licia Raymond and Dr. Lovell no longer performed any medical care or consultation for the Plaintiff.

C. STANDARD OF REVIEW:

When a party moves for summary disposition under MCR 2.116(C)(7), the court reviews the validity of the movant's claim by considering any affidavits, pleadings, depositions, admissions and documentary evidence then filed or submitted by the parties. If there is no factual dispute, the question of whether the claim is statutorily barred is one of law for the court to decide. *Taxpayers Allied For Constitutional Taxation v Wayne City*, 203 Mich App 537; 513 NW2d 202 (1994). Summary disposition pursuant to MCR 2.116(C)(7) should not be granted unless no factual development could provide a basis for recovery. *Harrison v Director of Department of Corrections*, 194 Mich App 446; 487 NW2d 799 (1992).

Where there are no factual disputes and reasonable minds cannot differ on the legal effect of facts, a decision regarding whether a plaintiff's claim is barred by the

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applicable statute of limitations is a question of law that the appellate court reviews *de novo*. *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003) and *Farm Bureau Mutual v Combustion Research Corporation*, 255 Mich App 715; 662 NW2d 439 (2003)

ARGUMENT

1. PLAINTIFF-APPELLANT WAS AWARE OF THE NATURE OF HER INJURY AND ITS RELATIONSHIP TO DEFENDANT'S SURGERY IN 1998:

Plaintiff's deposition testimony admits that she was aware of all of the elements necessary for this action as of April, 1998, and certainly by the end of 1998 and 1999. She was aware that her uterus and ovaries had been removed, that she would not be able to bear children, that she would require hormone replacement therapy, and that she was continuing to have left-side abdominal pain. Those are the very matters about which Plaintiff complained in her Notice Of Intent dated April 4, 2003, and later in her complaint.

The medical record establishes and the facts are undisputed that the Plaintiff complained of left lower quadrant or left-sided abdominal pain since the surgery in April, 1998. Repeatedly the Plaintiff described the pain as severe and persistent, and stated that she felt no better post-surgically than she had prior to the surgery performed by Dr. Lovell. She reported being very frustrated that she continued to have the pain, since she expected this would be relieved by the surgery.

Dr. Lovell saw the patient for follow-up on June 3, 1998 and recorded that Plaintiff had multiple questions about what happened at the time of the surgery. Dr. Lovell's office note indicates they had a lengthy discussion as to the surgery and the findings made by Dr. Lovell during the surgical procedure.

Plaintiff saw Dr. Lovell again in July, 1998 when she complained of lower back pain and other conditions. Dr. Lovell was in the process of adjusting the Plaintiff's hormone replacement therapy. In November, 1998 Plaintiff complained of left-sided

abdominal pain which she described as “extremely severe.” In December she called Dr. Lovell’s office stating she felt no better than she had prior to the surgery.

In her deposition, Plaintiff admitted she knew at the time of her six week check-up that her uterus had been removed, her ovaries had been removed, she could no longer bear children and she would have to take hormone replacement therapy. She was aware the conditions were permanent. She testified she had severe lower left abdominal pain, and stated that the pain did not exist prior to April, 1998. She testified that since April, 1998 she has been unable to sleep on either side and can only sleep on her back. (Plaintiff’s depo. p.41) Accordingly, her deposition testimony admits that she was aware of all of the elements necessary to her cause of action as of April and June, 1998. Since the Plaintiff experienced new left lower quadrant pain or left sided abdominal pain, or at least a continuation of the pain that existed prior to surgery, she was certainly aware the surgery was ineffectual and failed to correct her condition. The implication of that is that she may well have suspected the surgery was unnecessary, since removal of her uterus and ovaries had not relieved the pain which initiated the surgery.

2. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE PLAINTIFF-APPELLANT WAS AWARE OF A POSSIBLE CAUSE OF ACTION IN 1998:

The general period of limitations is two years for an action charging medical malpractice. MCL §600.5805(6) A cause of action accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the Plaintiff discovers or otherwise has knowledge of the claim. MCL §600.5838a. However, in a case where there is permanent loss of a reproductive organ resulting in

the inability to procreate, the applicable statute of limitations is two years “or within six months after the Plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL §600.5838a(3). The burden of proving that the Plaintiff neither discovered nor should have discovered the existence of the claim at least six months before expiration of the period is on the Plaintiff. A medical malpractice action that is not commenced within the time prescribed is barred. MCL §600.5838a(3)

Plaintiff claims recurring pelvic pain of at least the intensity it had prior to the surgical procedure, together with the loss of her reproductive ability and damages for the necessity to utilize hormone therapy. Her claim was filed on September 8, 2003, well beyond the applicable two year statute of limitations. The issue is whether the Plaintiff discovered or should have discovered the existence of the claim prior to the expiration of the two year period, and the service of the Notice Of Intent on April 3, 2003, which is five years after the surgical procedure. The filing of the lawsuit occurred on September 8, 2003 which is five years from the time the Plaintiff removed her records and transferred her medical care from Dr. Lovell to Dr. Raymond. The records and deposition testimony establish unequivocally that the Plaintiff was aware of the elements necessary for her claim shortly after the surgery in April, 1998, and by the end of 1998 and early 1999 when she continued to experience severe abdominal pain.

Plaintiff testified she did not anticipate the results of the surgery, and particularly the removal of her uterus and ovaries. (Plaintiff’s depo. p.36) Plaintiff reported she began to experience pelvic pain after the surgery, noting: “It didn’t exist prior to that.” (Plaintiff’s depo. p.40) The medical records establish that the Plaintiff continued to

complain of left lower quadrant and pelvic pain throughout the course of her treatment with Dr. Lovell up until the time she left his medical practice in September, 1999.

By late 1998 and in 1999 the Plaintiff was well aware that she had severe abdominal pain, and that the surgery performed did not relieve the pain that brought her to the emergency department and into surgery. By September, 1999 the Plaintiff was dissatisfied with Dr. Lovell, and she obtained copies of her records and sought the services of another obstetrician/gynecologist. Plaintiff made that physician aware of her abdominal pain, and that physician also suggested exploratory surgery, which the Plaintiff declined to have. Accordingly, the Plaintiff was well aware that the surgery performed by Dr. Lovell had not relieved her problems, and she could have concluded and certainly suspected that the hysterectomy procedure did not accomplish the intended result and may have been unnecessary.

The evidence that the Plaintiff knew of the nature of her injuries and the origin of her injuries is uncontroverted. This knowledge establishes that the Plaintiff was aware of a possible cause of action, since she was aware of her injuries and a possible causal link between the injuries "and an act or omission of the physician." *Solowy v Oakwood Hospital Corporation*, 454 Mich 214; 561 NW2d 843 (1997). Accordingly, the trial court properly determined that the Plaintiff was aware of a possible cause of action in 1998.

3. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE PLAINTIFF/APPELLANT'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS UNDER MCR 2.116(C)(7)?:

The trial court properly concluded that the Plaintiff was aware of a possible cause of action under the total circumstances presented in 1998. The court noted that the injuries which resulted from the alleged breach of the standard of care were all present and known to the Plaintiff at that time. This includes the continuing left abdominal pain, as well as the consequences of the hysterectomy. The Plaintiff was aware that her pain had not been relieved by the surgery. The Court noted that the Plaintiff was angry, shocked and surprised by the hysterectomy procedure, and with the persistence of the abdominal pain was sufficient to alert the Plaintiff to a potential cause of action.

The Plaintiff was sufficiently dissatisfied with Dr. Lovell as to obtain her records and transfer her medical care to another obstetrician/gynecologist. She did this in September, 1999, well within the applicable two year period of limitations. At that time, the Plaintiff was aware of her injuries and a possible causal link between those injuries and an act or omission of the physician. *Solowy v Oakwood Hospital Corporation*, supra.

The Court of Appeals, in a 2-1 unpublished decision, ignores the persistent abdominal pain and focuses only on the claim that the hysterectomy was “unnecessary.” However, in November, 1998 the Plaintiff described her left lower quadrant pain as continuing and “very severe,” and in December, 1998 the Plaintiff stated she felt no better than she had pre-operatively with reference to her left sided abdominal pain. (Medical record entries of November 24, 1998 and December 18, 1998.) On her telephone contact with the office of December 18, 1998 the Plaintiff

stated she felt very frustrated as she has had the pain since surgery. She stated she thought she would be better and no longer have the pain after the surgery. She voiced concern that she would always have to live with the pain. In a telephone call of January 5, 1999 she was described as very frustrated and distraught. Defendants contend that the statute of limitations runs when the Plaintiff, on the basis of objective facts, is aware of a possible cause of action, and this occurs when the Plaintiff is aware of an injury and the possible causal link between the injury and an act or omission of the physician. *Solowy*, supra at 232.

Clearly the Plaintiff was aware of “an injury,” in that she had had an extensive surgical procedure as a result of experiencing abdominal pain, and she continued to experience pain as severe or worse after the surgery which had removed her uterus and ovaries. She was aware of the consequences of the hysterectomy, being the inability to bear children and the necessity to take hormone replacement therapy. She was aware of the relationship of these items of injury to the surgical procedure performed on April 18, 1998. By focusing solely on the fact of the hysterectomy procedure, the Court of Appeals ignored the notice given to the Plaintiff by her continuing abdominal pain, which was the situation that initiated the surgery.

In the majority opinion, the Court of Appeals gave lip service to the decision of this Court in *Solowy*, supra, but decided the case based upon earlier decisions of the Court of Appeals in *Jackson v Vincent*, 97 Mich App 568; 296 NW2d 104 (1980) and *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991). As noted by Judge O’Connell in his dissenting opinion, the majority mistakenly relies upon these “outdated opinions” in applying a standard which conflicts with the decision of this Court in

Solowy, supra. (Court of Appeals decision, No. 259601, J. O'Connell dissenting, p.2 attached as **Exhibit 3**.)

Under MCL §600.5838a(3) the burden of proving that the Plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the Plaintiff. The statute specifically refers to "physical discomfort," and Plaintiff's continuing and severe left abdominal pain meets this statutory definition. The statute also refers to the "condition," and the status of the Plaintiff as post-hysterectomy and its consequences were admittedly known to the Plaintiff shortly after the completion of the surgery. Under the statute the Plaintiff discovered or should have discovered the existence of her claim, as defined by this Court in *Solowy*, supra, within the two year applicable period, since all of these matters were known to her in 1998 and 1999 and the statute would not have run until April, 2000.

The Marquette County Circuit Court properly determined that the Plaintiff's claim was barred by the applicable statute of limitations and granted Defendants summary disposition under MCR 2.116(C)(7).

CONCLUSION

Defendants seek leave to appeal to obtain reversal of the decision of the Court of Appeals and for reinstatement of the judgment of the Marquette County Circuit Court granting summary disposition in favor of Defendants under MCR 2.116(C)(7).

Respectfully submitted,

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Dated: December 6, 2005